



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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November 13, 2020

Matthew Flood
Assistant City Manager
Finance Officer
City of San Joaquin

Re: Your Request for Advice
Our File No. A-20-133

Dear Mr. Flood:

This letter responds to your request for advice regarding Government Code Section 1090, et seq.¹ Please note that we are only providing advice under Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest, including Public Contract Code.

Also, note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

We are required to forward your request regarding Section 1090 and all pertinent facts relating to the request to the Attorney General's Office and the San Joaquin County District Attorney's Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. (Section 1097.1(c)(4).) We are also required to advise you that, for purposes of Section 1090, the following advice "is not admissible in a criminal proceeding against any individual other than the requestor." (See Section 1097.1(c)(5).)

QUESTION

Do the conflict of interest provisions under Section 1090 prohibit the City of San Joaquin from issuing CARES Act grant funds to qualifying individuals who are tenants of City Councilmembers?

CONCLUSION

No. As explained below, Section 1090 does not prohibit the City from issuing CARES Act funds to qualifying tenants of Councilmembers.

¹ All statutory references are to the Government Code, unless otherwise indicated.

FACTS AS PRESENTED BY REQUESTER

You are the Assistant City Manager for the City of San Joaquin seeking advice on behalf of the San Joaquin City Council. The City has received grant funding via the CARES Act to provide COVID-related relief to residents. Under one of the programs the City will implement, and for which the City Council has already approved grant funds to be used, residents with problems paying for their housing (rent or mortgage) may seek assistance. To qualify, residents must show evidence that they have been impacted by COVID, be means-eligible, and request a benefit to be used toward the payment of housing. The City Council will not have any involvement in the approval of applications. And there will be no discretion on the part of those reviewing/approving applications to allow an individual who might not otherwise qualify to receive funds as applications will be approved based on state and/or federal guidelines of income and need.

Applicants will need to fill out certain certifications affirming that they are telling the truth regarding the elements used to determine their eligibility and, if they qualify, payments from program funds will be sent directly to the landlord or management company (in the case of a renter) or the financial institution (in the case of a mortgage). The City has already established that Councilmembers cannot apply to receive the benefit as a tenant or homeowner.

ANALYSIS

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.) Section 1090 is intended “not only to strike at actual impropriety, but also to strike at the appearance of impropriety.” (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.)

Under Section 1090, “the prohibited act is the making of a contract in which the official has a financial interest.” (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.) When an officer with a proscribed financial interest is a member of the governing body of a public entity, the prohibition of Section 1090 also extends to the entire body, and it applies regardless of whether the terms of the contract are fair and equitable to all parties. (*Id.* at pp. 646-649.)

As mentioned, the City has already established that Councilmembers cannot apply to receive the CARES Act grant funding as a tenant or homeowner. At this time, the determinative issue in this matter is whether there exists any exception under Section 1090 that permits a qualifying tenant of a Councilmember to take advantage of the program in order to pay rent to the Councilmember.

The Legislature has expressly defined certain financial interests as “remote” or “noninterest” exceptions to Section 1090’s general prohibition. Where a remote interest is present, the contract may be lawfully executed provided (1) the officer discloses his or her financial interest in the contract to the public agency; (2) the interest is noted in the public body’s official records; and (3) the officer completely abstains from any participation in the making of the contract. (Section 1091.)

Where a noninterest is present, the contract may be executed without the abstention. (Section 1091.5.)

Relevant to the present situation is the noninterest exception set forth in Section 1091.5(a)(3) for “public services generally provided.” That exception provides that an officer or employee “shall not be deemed to be interested” in a public contract if his or her interest in that contract is “[t]hat of a recipient of public services generally provided by the public body or board of which he or she is a member, on the same terms and conditions as if he or she were not a member of the body or board.”

The California Supreme Court considered the application of this noninterest exception and read the exception to establish the following rule:

If the financial interest arises in the context of the affected official’s or employee’s role as a constituent of his or her public agency and recipient of its services, there is no conflict so long as the services are broadly available to all others similarly situated, rather than narrowly tailored to specially favor any official or group of officials, and are provided on substantially the same terms as for any other constituent.

(Lexin v. Superior Court (2010) 47 Cal.4th 1050, 1092.)

With respect to an agency’s permissible exercise of discretion in providing a public service generally provided under the exception, the Supreme Court stated:

The presence of discretion in the formation of a contract that section 1091.5(a)(3) purportedly permits is not fatal, unless the discretion can be exercised to permit the special tailoring of benefits to advantage one or more board members over their constituency as a whole. Absent such a risk of favoritism, discretion is unproblematic.

(Id. at p. 1100.)

Thus, the noninterest exception set forth in Section 1091.5(a)(3) applies if: (1) the interest arises in the context of the affected official’s or employee’s role as a constituent of the public agency and recipient of its services; (2) the service at issue is broadly available to all those whom are similarly situated and is not narrowly tailored to specially favor an official or group of officials; and (3) the service at issue is provided on substantially the same terms as for any other constituent.

Here, if a Councilmember were to apply for the COVID-related relief, his or her interest in the CARES Act grant funds would arise in the context of the Councilmember being a City constituent and a recipient of City services. The grant funding is broadly available to all City residents with problems paying for their housing (rent or mortgage), and the program implemented by the City is not narrowly tailored to specially favor an official or group of officials. Indeed, the facts state that applications will be approved based on state and/or federal guidelines of income, and

thus there will be no discretion on the part of those reviewing/approving applications to allow an individual who might not otherwise qualify to receive funds.

Your question, however, is not whether Section 1090 prohibits a Councilmember from applying to receive grant funds under the City program. The City has already established that Councilmembers cannot apply to receive the benefit as a tenant or homeowner. Instead, you ask whether the tenant of a Councilmember may submit an application to take part in the program. Because we conclude that Councilmembers have a noninterest in the grant funds, Section 1090 would not prohibit a Councilmember from receiving the grant funds where his or her tenant submits an application that is approved pursuant to the program.

Accordingly, Section 1090 does not prohibit the City from issuing CARES Act grant funds to qualifying individuals who are tenants of Councilmembers.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Dave Bainbridge
General Counsel

By: *Jack Woodside*
Jack Woodside
Senior Counsel, Legal Division

JW:aja